In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1006

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,

Petitioners,

v.

ALBERT EDWARD GLINES,

Respondent.

On Petition For A Writ Of Certiorari To The

United States Court of Appeals

For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Albert Edward Glines, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 586 F.2d 675.

QUESTIONS PRESENTED

1. Whether Air Force requlations that require military personnel to obtain approval before circulating petitions to members of Congress on Air Force bases are invalid under 10 U.S.C. 1034.

2. Whether Air Force regulations that require military personnel to obtain approval before circulating petitions on base violate the First Amendment.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary

The petition for a writ of certiorari should be denied because the issues raised in the petition are not of widespread importance since the armed services remain free to protect legitimate military interests and these issues arise infrequently and because there is no conflict among the lower courts.

1. THE COURT OF APPEALS DECISION DOES NOT PREVENT THE ARMED SERVICES FROM PROTECTING LEGITIMATE MILITARY INTERESTS.

The issues raised in the instant case are also raised in petitions for writs of certiorari in Brown v. Allen, No. 78-1005 and Secretary of the Navy v. Huff, No. 78-599. None of these three decisions prohibits the armed services from regulating petitioning activities by reasonable time, place and manner restrictions adapted to the military context, or from punishing service personnel whose petitioning activities threaten a disturbance. None of these decisions involve a combat zone and none prevents the armed services from imposing a prior restraint on petitioning activities in a combat zone. These decisions only prohibit the imposition of a prior restraint on the right to petition outside of a combat zone.

The Court of Appeals in the instant case recognized the necessity for military discipline. Glines v. Wade, 586 F.2d at 680 (9th Cir. 1978); Glines petition at 11a-12a. However, the court concluded:

> Punishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signatures would adequately protect the government's interest.

Id. The court specifically approved the time, place and manner restrictions for petitions on board a ship that were adopted by the district court in Allen v. Monger, 404 F. Supp. 1081, 1090-91 (N.D. Cal. 1975); Allen petition at 30a-32a. These restrictions clearly show the flexibility retained by the armed services in

regulating on-base petitioning. They allow an outright ban on petitions in a combat zone. Outside of a combat zone, petitions could be prohibited (a) in work areas, (b) by or to persons on duty, (c) in sleeping areas, (d) in the mess hall during meals, and (e) by superior officers in a manner that coerces signatures. In addition, the district court provided for reasonable limitations on the use of bulletin boards as a petitioning medium. Allen v. Monger, supra at 1090-91; Allen petition at 30a-31a; approved, Glines v. Wade, supra at 680, n.9; Glines petition at 12a, n.9.

Petitioning is one of the most peaceful forms of group communication. Should petitioning activities, however, lead to a disturbance of the peace or threaten good order and discipline, they are punishable under 10 U.S.C. §§ 916, 917 and 934 (1976), (Articles 116, 117, and 134, respectively, of the Uniform Code of Military Justice [UCMJ]).[1] Moreover, acts done with the intent of causing a disturbance are punishable under 10 U.S.C. 880 (1976), (Article 80 of the UCMJ),[2] without awaiting any disturbance.

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1. 10 U.S.C. § 916 (Art. 116) states:

   Riot or breach of peace

   Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

   10 U.S.C. § 917 (Art. 117) states:

   Provoking speeches or gestures:

   Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.

   10 U.S.C. § 934 (Art. 134) states:

   General article

   Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

2. 10 U.S.C. § 880 (Art. 80) states:

   Attempts

   (a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense. (Continued)

Thus, the armed services are quite capable of protecting their interests without a prior restraint on the right to petition. The Court of Appeals decisions in these cases need not be disturbed.

2. THE ISSUES RAISED IN THE GOVERNMENT'S PETITION ARISE INFREQUENTLY.

Disputes regarding the right to petition on a military base seldom arise, so there is no pressing need for a Supreme Court pronouncement. To counsel's knowledge, aside from the current cases on petition for writs of certiorari, only one other case involving the right to petition on a military base has ever been filed in a federal court. [Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975).]

3. THERE IS SUBSTANTIAL AGREEMENT AMONG LOWER COURT JUDGES WHO HAVE RULED ON THE ISSUES RAISED IN THE GOVERNMENT'S PETITION.

The current cases on petition for writs of certiorari, Glines, Allen and Huff, are the only court decisions involving the right to petition on a military base outside of a combat zone.[3] In these three cases, the Courts of Appeals for the Ninth Circuit and the District of Columbia agreed that prior restraints on petitioning outside a combat zone violate 10 U.S.C. 1034. In Glines v. Wade, the Court of Appeals for the Ninth Circuit additionally found that the Air Force regulation violated the First Amendment. Glines, supra at 681; Glines petition at 13a-14a. Thus, there is no conflict among the circuits on these issues.

Moreover, there is substantial agreement among the judges who have ruled on these issues. Of the nine judges at the district and court of appeals levels reviewing the various military regula-

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2. (Cont'd)

   (b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

   (c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

3. Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975), involved on-base petitioning in a combat zone.

tions involved, eight have agreed that the regulations violated 10 U.S.C. 1034. [Judge Tamm is the lone dissenter, in Huff v. Secretary of the Navy, 575 F.2d 907 (D.C. Cir. 1978), Huff petition, 22a-26a (dissenting opinion).] Of the six judges who have reached the constitutional issue, all six found a violation of the First Amendment. See Glines v. Wade, 586 F.2d at 681, 401 F. Supp. at 132, Glines petition at 13a-14a, 26a; Allen v. Monger, 404 F. Supp. at 1089-90, Allen petition at 28a-29a; Huff v. Secretary of the Navy, 413 F. Supp. at 809, Huff petition at 56a-57a.

The lower court decisions will provide adequate guidelines for revisions of the applicable regulations. That the Glines decision reached the constitutional issue will not obscure the standard for revising these regulations because once the prior restraint is removed to comply with 10 U.S.C. 1034, the regulations will also comply with the First Amendment.

4. CERTIORARI SHOULD BE DENIED IN ALL THREE CASES.

The government has recommended that the disposition of the Petition for Writ of Certiorari in Brown v. Glines, No. 78-1006 should be deferred pending disposition of the petition in Secretary of the Navy v. Huff, No. 58-599. This same recommendation was made in connection with Brown v. Allen, No. 78-1005. The arguments enumerated above also justify denying the petitions in Huff and Allen.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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